Supreme Court, U.S.
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No. 00-1950

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF CASE

This case arises out of the denial of medical staff and clinical privileges to a physician, Mahfouz El Shahawy, M.D. ("Shahawy"), by a local governmental body, the Sarasota County Public Hospital Board (the "Board"). The Board operates a local public hospital, Sarasota Memorial Hospital (the "Hospital"). After formal peer review hearings, the Board concluded that Shahawy's disruptive behavior presented too great a risk of hindering quality patient care at the Hospital and denied Shahawy's application for restoration to the medical staff.

Although this case relates to Shahawy's 1991 application for privileges at the Hospital, disputes between Shahawy and the Board date back to the early 1980s. Shahawy's disruptive behavior, specifically found to adversely affect the quality of patient care and orderly operation of the Hospital, was a major ground when the Board terminated Shahawy's membership on the medical staff at the Hospital in 1983.

In January, 1991, Shahawy filed a new application for medical staff membership. After going through the peer review procedures prescribed by the medical staff by-laws, that application was denied by the Board. Again, Shahawy's disruptive behavior was a ground.

Shahawy filed two suits in state court, one against various then-current Board members, and the other a Petition for Certiorari to review the Board's denial. Pursuant to the settlements of those cases, the peer review of Shahawy's 1991 application was reconvened. Shahawy contended he was no longer disruptive, that he was a changed man.

On October 25, 1994, the Board held a formal hearing. At the conclusion of the hearing, Shahawy exploded into a tirade. His counsel was unable to calm him. On October 31, 1994, the Board met, reviewed the evidence, and voted six to two to deny Shahawy's application.

Shahawy's tirade was the primary reason for the Board's decision. In this regard, the history of Shahawy's relationship with the Hospital, a history of disruptive conduct, was significant. Six Board members believed that because Shahawy flew off the handle on October 25, 1994, there was much too much probability that he would do so again and again.

This litigation followed. The case against the Board went to trial on three counts: a claim that the denial of Shahawy's application was in retaliation for his exercise of his First Amendment right of free speech, a claim that the denial of the application was on account of his Egyptian national origin, and a breach of contract claim relating to the settlement agreements. In addition, there were civil rights claims by Shahawy against five individual Defendants (past and present Board members who voted to deny Shahawy privileges) alleging discrimination based upon his national origin.

Trial before a jury commenced on January 6, 1997. At the conclusion of Shahawy's case-in-chief, the District Court granted the individual Defendants' and the Board's motions for judgment as a matter of law as to all of Shahawy's civil rights claims, including the claims alleging national origin animus and discrimination. The District Court later held there was no breach of contract. Judgment was in favor of all Defendants on all counts.

Shahawy appealed to the Eleventh Circuit Court of Appeals with regard to the contract claim and Health Care Quality Improvement Act immunity. On January 18, 2000, the Eleventh Circuit affirmed, and Shahawy's Petition for a Writ of Certiorari to this Court was denied on October 2, 2000. Shahawy did not appeal the District Court's ruling with regard to either his First Amendment claim against the Board or his national origin discrimination claims against the Board and the individual Defendants.

The District Court awarded attorney's fees, expert fees, and costs in excess of $450,000 in favor of the Board and the individual Defendants against Shahawy. Specifically, as to attorney's fees, the District Court awarded $185,000 in favor of the Board, $50,000 in favor of Defendant Marilyn J. Lee, and $36,250 each in favor of Defendants Richard Nash, Phyllis Cobb, Martin Moss, and Ruth Hochman. Pet. App. 2a-3a.

In the 22-page Order determining entitlement to fees, the District Court conducted a detailed analysis of this case under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Pet. App. 12a-32a. The Court methodically applied the factors enunciated by the Eleventh Circuit in *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985) as general guidelines in making its determination. Pet. App. 14a-22a. In addition to a finding that the Defendants are entitled to an attorney's fees award pursuant to the *Sullivan* factors, the District Court also determined "that defendants are entitled to a fee award based on plaintiff's bad faith motives in litigating this case." Pet. App. 29a.

The District Court noted that the Shahawy's contract case had an "arguable foundation" but that Shahawy's civil rights claims "were brought solely to vex and oppress the Board,

especially the individual defendants." Pet. App. 29a. With regard to the individual Defendants, the Court stated:

> From his assertion of individual liability of the defendant Board members on multiple counts, to his prayer for unspecified punitive damages against the defendants, to his attempts during trial to obtain overbroad and unwarranted discovery into several of those defendants' personal finances, to his attempt to use this suit to resurrect the claims that were a decade old and already resolved, plaintiff wantonly asserted his civil rights claims to punish the defendants and further himself personally. Such abuse merits an appropriate sanction to both punish and deter.

Pet. App. 29a-30a.

The District Court made a special point to acknowledge that attorney's fees are only to be awarded in rare cases:

> The court is entirely mindful of the heightened standard that must be met in order to merit an award of fees in favor of the defendants in a civil rights action. But the court is firmly convinced, having presided over this case since its inception, that the instant case is the rare one in which fees are warranted. Not satisfied with the fairly debatable contract claim he had, plaintiff also conjured up multiple other civil rights claims. In the process, plaintiff abused not only the laws of this nation but also the jurisdiction of this court.

Pet. App. 30a-31a.

After a Petition for Rehearing to the District Court was denied, Shahawy brought his appeal to the Eleventh Circuit. The Eleventh Circuit affirmed, without Opinion, on February 16, 2001. Shahawy's Petition for Rehearing to the Eleventh Circuit was denied on March 28, 2001.

SUMMARY OF ARGUMENT

No important question of federal law that should be decided by this Court is presented by the Petition. The District Court completely, thoroughly, and properly analyzed the Defendants' claims for attorney's fees under *Christiansburg*, finding Shahawy liable for fees. The Eleventh Circuit affirmed, without opinion. The decision below is not in conflict with *Christiansburg*. Each of Shahawy's justifications for a Writ of Certiorari is based on nothing more than Shahawy's disagreement with the District Court's view of the facts and the application of the relevant case law to those facts.

With Supreme Court Rule 10 as a guide, the Petition presents no reason, and certainly no "compelling" reason, why this Court should accept review. Shahawy's Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT, NOR DOES THE DECISION BELOW CONFLICT WITH *CHRISTIANSBURG*

This case presents no important question of federal law that should be settled by this Court. The issues presented are significant only to the parties to the proceeding. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). There is no public or national interest to be served and no policy determination to be made here.

Shahawy's issue is not with the law or with the legal analysis, but instead with the factual determinations that have been made or with his erroneous perception that *Christiansburg* was misapplied. As Supreme Court Rule 10 provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous facutal findings or the misapplication of a properly stated rule of law."

Throughout these proceedings all parties have agreed that *Christiansburg* was the proper Supreme Court precedent to be applied here. The *Christiansburg* rule of law was "properly stated" by the District Court below. Pet. App. 14a. Where the District Court and the Court of Appeals unquestionably applied the correct rule of law and there is no apparent error, certiorari should be denied.

The analysis of the propriety of the award of attorney's fees in favor of defendant in a civil rights action is, of necessity, a case-by-case and factually intensive analysis.

As such, this case is particularly ill-suited for review by this Court. If review is accepted, this Court will be drawn into a factual analysis already performed by two courts, the District Court and the Eleventh Circuit Court of Appeals. In that Shahawy filed petitions for rehearing in both the District Court and the Eleventh Circuit, Shahawy's Petition to this Court seeks a fifth review of the same facts as applied to *Christiansburg*. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

That Shahawy is asking this Court to engage purely in a review of the evidence is illustrated by his reliance on the proffered testimony of one witness, Bonniejean Christensen, a personal friend and political crony of Shahawy's. That the lower courts ascribed the appropriate value to that testimony is also clear. Christensen's testimony was vague, inconsistent, and fragmented. She was unable to identify any specific derogatory comments as coming from any particular individual. For example, with regard to the alleged comment about a "camel driver," she testified that Board members Moss, Cobb, and Albertson were "one small group," in a larger group, in a room with a "great number of people." R. 23-264-29,30. Although Ms. Christensen was able to eliminate Mr. Albertson as the individual who allegedly uttered the phrase, she was unable to identify who actually made the statement. R. 23-264-29. Throughout her testimony, Ms. Christensen noted that she did not remember significant details (such as who said what) regarding the allegedly derisive statements because she "didn't pay any attention . . . to those things," "tried not to . . . remember" the alleged statements, or "simply block[ed] . . . them out." R. 23-264-103,34,30. This, from the witness presenting Shahawy's "strongest evidence." Pet. 3.

The form of the Judgment entered also serves to illustrate that this case is inappropriate for certiorari review. The Judgment for attorney's fees is in fact a series of separate awards in favor of not just the Board but also five individuals. Pet. App. 2a-3a. The Petition seems to ignore this fact. Thus, a review of this case would, of necessity, be a detailed review of the facts as they relate to each of the separate individuals as well as the Board. The total lack of specific attribution of any derogatory comment to any of the five individuals was relied upon by the District Court as part of the foundation for the finding of bad faith.

By his Question Presented, Shahawy suggests that the District Court, having allowed Shahawy's national origin discrimination claims to withstand summary judgment (the District Court warned Shahawy that he was on "thin ice" and that he had avoided summary judgment "by the narrowest of margins") and having permitted Christensen to testify after a proffer, was precluded from awarding fees. That the District Court allowed Shahawy to escape summary judgment and permitted Christensen to testify merely indicates that the District Court gave Shahawy the widest possible leeway, and afforded Shahawy every possible opportunity to prove his case. But *Christiansburg* does not suggest that a district court judge ties his or her own hands with regard to attorney's fees by affording a litigant such opportunities. The District Court was in the best position to analyze the facts of this case under *Christiansburg* and the Eleventh Circuit did not disagree with that analysis.

Shahawy's assertion that the decision below presents a question of public importance is misplaced. This case is only important to the litigants involved. This is "a fact bound issue" of no importance to the public "since similar situations

are unlikely to arise with any regularity." *Massachusetts v. Sheperd*, 468 U.S. 981, 988 n.5 (1984). The unreported District Court Opinion and the Eleventh Circuit's affirmance (without opinion) will have no chilling effect on potential civil rights plaintiffs: future claims of attorney's fees against unsuccessful civil rights plaintiffs will be decided as before, on a case-by-case basis under *Christiansburg*, and will be awarded, as before, rarely.

CONCLUSION

For the foregoing reasons, Respondents respectively request that this Honorable Court deny the Petition.

Respectively submitted,

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